

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 03-105
Table of Allotments,) RM-10671
FM Broadcast Stations.)
(Glens Falls, Indian Lake, Malta)
and Queensbury, New York))

NOTICE OF PROPOSED RULE MAKING**Adopted: April 28, 2003****Released: April 30, 2003****Comment Date: June 23, 2003****Reply Comment Date: July 8, 2003**

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed by Vox New York, LLC, licensee of Station WNYQ, Queensbury, New York, and Entertronics, Inc., licensee of Station WCQL, Glens Falls, New York ("Petitioners"), requesting changes to the FM Table of Allotments. Petitioners request the substitution of Channel 289A for Channel 289B1 at Queensbury and reallocation of Channel 289A to Malta, New York, reallocation of Channel 240A from Glens Falls to Queensbury, New York, and the allotment of Channel 290A at Indian Lake, New York. Petitioners state that if the Commission grants its request, it will file applications for channels at Malta, Glens Falls and Queensbury.

2. Petitioners seek to invoke the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.¹ In support of its proposal, Petitioners state that each allotment is mutually exclusive with the existing allotments and would provide the requisite 70 dBu coverage to the principal communities associated with the new allotments in compliance with Section 73.315(a) of the Commission's Rules. Petitioners further state that the adoption of its proposal will result in a preferential arrangement of allotments consistent with the *FM Allotment Priorities*,² by providing Malta, New York, (population of 13,000),³ with its first local aural transmission service. The reallocation of Channel 289A from Queensbury to Malta would not deprive Queensbury (population of 25,441) of its sole local transmission outlet, because Queensbury would retain local service with the reallocation of Channel 240A from Glens Falls to Queensbury, and the modification of the WCQL license to specify this community of license. Petitioners state that by downgrading Channel 289B1 to a

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

² See *Revision of FM Assignment Policies and Procedures ("FM Allotment Priorities")*, 90 FCC 2d 88 (1982). The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters [co-equal weight is given to priorities (2) and (3)].

³ Population figures reported herein were taken from the 2000 U.S. Census.

class A facility at Queensbury, Channel 290A can be allotted to Indian Lake, New York, as a first local service. Petitioners state that the allotment of Channel 289A at Malta will place a city-grade signal over more than 50 percent of the Saratoga Springs Urbanized Area and that the existing allotment of Station WNYQ at Queensbury currently serves, in part, the Glens Falls Urbanized Area. Therefore, reallocation of Station WNYQ from Queensbury to Malta would not trigger the concerns regarding migration of stations from rural areas to urban areas as it already serves an urbanized area. Nevertheless, Petitioners are providing a showing that Malta is independent of the Saratoga Springs Urbanized Area under the factors set forth in *Faye and Richard Tuck*.⁴ Petitioners' engineering analysis shows that the present WNYQ facilities at Queensbury cover an area of 4,879 square kilometers serving 164,293 people. The allotment of Channel 289A at Malta will cover 2,521 square kilometers serving 471,751 people for an increase of service to 307,458 people. The reallocation of Channel 240A from Glens Falls to Queensbury will not deprive Glens Falls of local services as the community will continue to be served by Stations WGFM(FM), WLJH(FM), WMML(AM) and WWSC(AM). Further, Petitioners' engineering analysis shows that the present Station WCQL facility at Glens Falls covers 1,854 square kilometers serving 123,453 people and of that area, 1,437 square kilometers and 107,254 people will continue to receive 60 dBu service from Station WCQL at Queensbury. The allotment of Channel 240A at Queensbury covers 2,516 square kilometers serving 126,358 people. Petitioners note that the allotment of Channel 240A at Glens Falls is a grandfathered short-spaced three kilowatt Class A allotment while the allotment of Channel 240A at Queensbury is a fully spaced six kilowatt Class A allotment. Petitioners contend that their proposal further serves the public interest with the allotment of Channel 290A as a first local service at Indian Lake, New York, a community of 1,471 people.

3. Since Petitioners' reallocation request is consistent with the provisions of Section 1.420(i) of the Commission's Rules, we shall propose to modify the authorization of Station WNYQ, Queensbury, New York, to specify operation on Channel 289A at Malta, New York, and modify the license for Station WCQL to specify operation on Channel 240A at Queensbury, New York, without entertaining competing

⁴ See 3 FCC Red 5374 (1988). (Eight factor analysis for determining a proposed community's independence from a nearby urbanized Area) *Malta offers its Residents Significant Employment opportunities (Factor 1) and Malta has Local Business and Health Facilities (Factors 1 and 6)*. Malta promotes local commerce through the Malta Business and Professional Association. Businesses include Best Buy Housing & Furniture Theatre, Leprechaun Pub, The Public House Restaurant, Ballston Spa National Bank, KeyBank, Pioneer Savings Bank, headquarters of Stewart's Shops and the North Atlantic Regional Office of the State Farm Insurance Company. Several businesses use the name "Malta" in their name such as the Malta Drive-In Theatre, Al's Malta TV Sales & Service, and the Malta Touch Free Car Wash. *Malta Residents and Government Leaders Clearly Consider Malta to be Separate from Surrounding Communities (Factor 3)*. Malta, located in the southern portion of Saratoga County, is celebrating its 200th Anniversary as a community this year with numerous community day activities. Malta is home to several parks, including Collamer Park, Shenanthaha Creek park and Malta Community Park. The town has its own web site which recounts Malta's history and development. In August 2001, New York Governor George Pataki announced that a new business park would be located in Malta, representing the first such facility in the country devoted to New energy technologies. *Malta has its own Zip Code and Local Telephone Book (Factor 5)*. *Several Local Newspapers and other media serve Malta Residents; Businesses need not rely on Saratoga Springs-based Media to Reach Malta Residents (Factors 2 and 7)*. Malta constitutes a separate advertising market from Saratoga Springs because Malta residents may turn to several media outlets outside of Saratoga Springs for coverage of local events and public affairs. Malta residents may use the local government's web site which includes an online newsletter containing news of interest to local residents. *Malta has a local Government and Elected Officials (Factor 4)*. Malta has an elected five-person town board which comprises a town supervisor, a deputy supervisor and three members. The town government has the authority to issue permits, assess property and conduct zoning functions. Malta provides its residents with many fundamental services, including public works, parks and recreation services and a Volunteer Fire Department.

expressions of interest in the use of these channels.⁵ We shall also propose the allotment of Channel 290A at Indian Lake, New York, as a first local service.⁶ Channel 290A can be allotted to Indian Lake without a site restriction. A staff engineering analysis indicates that the reallocation of Channel 289A from Queensbury to Malta will result in a loss of service to 123,334 people with a gain in service to 363,492 people, with the majority of the loss area having five or more services. We further show that the allotment of Channel 289A at Malta covers 13.7% of the Albany, New York Urbanized Area and approximately 86% of the urbanized area of Saratoga Springs. Petitioners have provided a *Tuck* showing establishing independence of Malta from the urbanized areas. The staff analysis further indicates that the reallocation of Channel 240A from Glens Falls to Queensbury will result in a loss of service to 50,013 people with a gain in service to 12,170 people. Both the loss and gain areas are served by five or more aural services. Since Queensbury, Malta and Indian Lakes are located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian Government will be requested for these allotments. Further, the proposed allotment of Channel 240A at Queensbury will be requested as a specially negotiated short-spaced allotment as it is short spaced to Channel 240C1, Station CJFM, Montreal, Quebec, Canada.

4. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel Nos.</u>	
	<u>Present</u>	<u>Proposed</u>
Indian Lake, New York	----	290A
Malta, New York	----	289A
Queensbury, New York	289B1	240A
Glens Falls, New York	240A	----

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **June 23, 2003**, and reply comments on or before **July 8, 2003**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the Petitioner's counsel, as follows:

⁵ The coordinates for Channel 289A at Malta, New York, are 42-58-58 and 73-48-00. The coordinates for Channel 240A at Queensbury, New York, are 43-24-12 and 73-40-25.

⁶ The coordinates for Channel 290A at Indian Lake, New York, are 43-46-57 and 74-16-20.

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7. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistrionix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁷

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment, which has not been served on the petitioner, constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau

Attachment: Appendix

⁷ See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW, Washington, D.C.

